CHINA INSURANCE CO. LTD. v. LOONG MOH CO. LTD.

[F.C. (Thomson L.P., Chua & Winslow JJ.)
February 26, 1964]

[Singapore — F.C. Civil Appeal No. 78 of 1963]

Insurance — Marine Insurance — Casualty — Suit by assignees of policy against underwriters.

Practice and Procedure — Commercial list — Interlocutory application for ship's papers order under English R.S.C., O. 31 r. 12A (now O. 24 r. 9) — Whether court should grant such an order — R.S.C. 1934 O. XXA.

Precedent — Matter decided by S. S. Court of Appeal — Whether binding on Federal Court.

The appellants were underwriters and the respondents were assignees of a policy of insurance which it was said to be relevant to a marine casualty alleged to have occurred in the Straits of Malacca. The matter was transferred to the Commercial List in the course of the proceedings and the appellants asked for a ship's papers order provided for by O. 31 r. 12A of the English R.S.C. (now replaced by O. 24 r. 9). The application was refused and against that refusal the appellants appealed.

Held: the appeal should be dismissed because the point was concluded by the decision of the Straits Settlements Court of Appeal in *K. E. Mohamed Sultan Maricar* v. *Prudential Assurance Co. Ltd.*(2) (without deciding whether that case was rightly or wrongly decided) where it was held that such an order could not be made in the then Straits Settlements.

Observations on Order XXA.

Cases referred to:—

(1) *Leon & Ors.* v. *Casey* [1932] 2 K.B. 576, 587.

(2) *K. E. Mohamed Sultan Maricar* v. *Prudential Assurance Co. Ltd.* [1941] M.L.J. 20; [1941] M.L.J. Rep. 18.

FEDERAL COURT.

J. E. Lloyd for the appellants.

Goh Joon Seng for the respondents.

Thomson L.P. (delivering oral judgment): This is an appeal from a decision of Mr. Justice Tan Ah Tah in an interlocutory matter arising in the course of marine insurance proceedings.

The defendants in the proceedings are underwriters and they are being sued by the assignee of a policy of insurance which is said to be relevant to a marine casualty which was alleged to have occurred somewhere in the Straits of Malacca. In the course of the proceedings the matter was transferred to the Commercial List, so called, and then the defendants asked for what is compendiously, though perhaps not very accurately, described as a ship's papers order, that is the type of order that is provided for by Order 31 rule 12A of the English Supreme Court Rules (now replaced by Order 24 rule 9).

The application was refused and against that refusal the applicants, the defendants in the original proceedings, have now appealed.

Before expressing my views on the appeal I would quote the following observations by Greer L.J. in the case of *Leon & ors.* v. *Casey*: (1)

> "....no more unpleasant duty has to be performed by a judge than that of giving, in accordance with binding authority, a decision which upon the facts before him he considers both unreasonable and unjust."

I am about to subject myself to that extremely unpleasant ordeal by saying that in my view the point is concluded by the decision of the Straits Settlements Court of Appeal in the case of *K. E. Mohamed Sultan Maricar* v. *Prudential Assurance Co. Ltd.*(2) where it was held that such an order could not be made in the then Straits Settlements. As to whether that case was rightly or wrongly decided I express no opinion; that point will have to be decided, if at all, elsewhere. But it is a decision which affects a type of litigation that is common here. It has now stood for over 23 years. There can be little doubt that during these 23 years it has frequently been considered by practitioners as a guide in the course of litigation. In my view it would be wrong for us not to accept it.

I have not overlooked the argument that some difference may have been made by Order XXA setting up the so-called Commercial List. With regard to that argument my own view, shortly, is that Order XXA did not confer any new procedural rights upon litigants. What it did do was to make provision regarding the exercise of existing procedural rights with a view to securing expedition and efficiency in dealing with the type of litigation with which the Order was concerned.

I would, therefore, although with considerable reluctance, dismiss the appeal with costs and order payment out to the respondents of so much of the deposit in Court as will cover their taxed costs.

Chua and **Winslow JJ.** concurred.

Appeal dismissed.

Solicitors: *Drew & Napier*; *M. B. Brash.*

YONG MOI & ANOR. v. THE ASIA INSURANCE CO. LTD.

[F.C. (Thomson L.P., Chua & Winslow JJ.)
April 6, 1964]

[Singapore — Federal Court Civil Appeal No. 57 of 1963]

Insurance — Deceased passenger of car — Car driven by friend of deceased — Car borrowed by deceased — Judgment against driver of car for damages — Judgment not satisfied — Claim against insurers — Insurers denying liability because car driven without owner's permission — Whether there is implied consent.

Motor Vehicles (Third Party Risks and Compensation) Ordinance, 1960, s. 8(1).

Bailment — Distinction between gratuitous bailment and bailment for valuable consideration.

In 1957 one Ho was the owner of an Austin motorcar in respect of which there was in existence an insurance policy issued by the respondents. On October

6, 1957, Ho lent his car to his cousin Woo to go to a wedding at Segamat. Woo left for Segamat later that morning with a number of friends including Yong Choy. In the course of the journey Woo had a headache and he asked Yong Choy to drive. Yong Choy proceeded to do so and shortly afterwards the car met with an accident in consequence of which Woo suffered injuries whereby he died. The appellants, the administrators of Woo's estate commenced proceedings against Ho and Yong Choy based on the alleged negligent driving of Yong Choy. These proceedings were discontinued against Ho but on May 29, 1961 judgment was entered in favour of the administrators against Yong Choy for $2,800 under section 7 of the Civil Law Ordinance and $23,000 under section 12 of the same Ordinance. That judgment was not satisfied and accordingly the present proceedings were commenced against the respondents as insurers by virtue of section 8(1) of the Motor Vehicles (Third Party Risks and Compensation) Ordinance. The insurers defended on the ground that Ho's policy did not cover any liability which might be incurred by Yong Choy. The section of the policy provided that the insurers "will indemnify any person who is driving such motor car on the insured's order or with his permission" and it was the case for the respondents that Yong Choy was not entitled to such indemnity because at the material time he was not driving the motor car on the order or the permission of Ho, the insured.

There was no evidence that Ho ever gave express permission to Yong Choy to drive. On a question as to whether there was implied consent the trial judge answered the question in the negative and gave judgment for the respondents ([1963] M.L.J. 329). On appeal,

Held: when Ho lent his car to the deceased all he knew was that it was for the purpose of taking the deceased and some other people whose names he did not know to the wedding at Segamat. As there was no express prohibition by Ho of any particular individual driving the car the irresistible inference was that there was an implied consent to the car being driven by the deceased or any other member of the deceased's party who was a licensed driver.

Cases referred to:—

(1) *Paget* v. *Poland* (1947) 80 Ll.L.R. 283.

(2) *Tappenden* v. *Aztus* [1963] 3 All E.R. 213, 218.

(3) *McLeod* v. *Buchanan* [1940] 2 All E.R. 179, 187.

(4) *Kelly* v. *Cornhill Insurance Co. Ltd.* [1964] 1 All E.R. 321.

FEDERAL COURT.

A. P. Godwin for the appellants.

J. D. Donnelly for the respondents.

Cur. Adv. Vult.

Thomson L.P.: This is an appeal from a decision of the High Court in Singapore.

The material facts of the case have never been in any serious dispute and are as follows.

In 1957 one Ho Nee San was the owner of an "Austin" motor-car No: SR 3851 in respect of which there was in existence an insurance policy issued by the Asia Insurance Company Limited (whom I shall hereafter call "the insurers").

On the morning of 6th October, 1957, Ho Nee San lent his motor-car to his cousin, Woo Eng Chuan, to go to a wedding at Segamat which is some 135 miles north of Singapore. He had lent the car to Woo on previous occasions. Later in the morning Woo left for Segamat himself driving the car in which were a number of friends, including one Yong Choy. In the course of the journey Woo had a headache and asked Yong Choy to drive. Yong Choy proceeded to do so and shortly afterwards the car met with an accident in consequence of which Woo suffered injuries whereby he died.

In consequence the administrators of Woo's estate commenced proceedings against Ho Nee San and Yong Choy based on the alleged negligent driving of Yong Choy. These proceedings were discontinued as against Ho Nee San but on 29th May, 1961, judgment was entered in favour of the administrators against Yong Choy for $2,800 under section 7 of the Civil Law Ordinance and $23,000 under section 12 of the same Ordinance. That judgment was not satisfied and accordingly the present proceedings were commenced against the insurers by virtue of the provisions of section 8(1) of the Motor Vehicles (Third-party Risks and Compensation) Ordinance, 1960.

The insurers defended on the ground that Ho Nee San's policy under which the certificate of insurance had been issued did not cover any liability which might be incurred by Yong Choy. The section of the policy relating to liability to third parties provided in a formula which is common in this type of policy that the insurers "will indemnify any person who is driving such Motor car on the insured's order or with his permission" and it was the case for the insurers that Yong Choy was not entitled to such indemnity because at the material time he was not driving the motor-car on the order or with the permission of the insured who was, of course, Ho Nee San.

There was no evidence that Ho Nee San ever gave express permission for the car to be driven by Yong Choy, and indeed the evidence negatived this. The question, therefore, was whether or not in the circumstances it must be held that he gave implied permission.

The learned trial judge answered that question in the negative and accordingly gave judgment for the insurers.

Against that decision the administrators have now appealed.

With great respect, for myself I am unable to accept the trial judge's conclusion. When Ho Nee San lent his car to the deceased all he knew was that it was for the purpose of taking the deceased and some other people whose names he did not know to the wedding at Segamat. Nothing was said about the driving of the car.

There was no express prohibition of any particular individual driving the car as there was in the case of *Paget* v. *Poland.*[1] In the circumstances the inference seems irresistible that there was an implied consent to the car being driven by the deceased or any other member of the deceased's party who was a licensed driver.

In that connection our attention was drawn to the following observations by Diplock L.J. in the case of *Tappenden* v. *Artus,*[2] the report of which was not available to the trial judge:—

"The grant of authority to use goods is itself to be construed as authority to do in relation to the goods all things that are reasonably incidental to their reasonable use. If the bailor desires to exclude the right of the bailee to do in relation to the goods some particular thing which is reasonably incidental to their reasonable use, he can, of course, do so, but he must do so expressly."

For the respondents it was argued that these observations were not altogether in point because the bailment in that case was not, as here, a purely gratuitous one. In my view the point is without substance. The principal difference between a gratuitous bailment and a bailment for valuable consideration lies in the standard of care which the bailee owes to the bailor in relation to the chattel involved. This might well have been relevant had there been any question of Yong Choy being notoriously a bad driver or if he, with or without the deceased, had used the motor-car to go off on some frolic which had no connection with the wedding trip to Segamat. Had there been anything of the sort the inference of implied permission might well not have arisen. But there was nothing of the sort.

I would add that I am fortified in this view by the following observations of Lord Carmont (in relation to the interpretation of section 35 of the Road Traffic Act, 1930) which were quoted by the House of Lords in the case of *McLeod* v. *Buchanan*:— [3]

"I think that anyone who parts with the control of a motor vehicle completely, without making any definite arrangement with the custodian as to use, impliedly permits all uses".

I would add that since writing this judgment I have seen the report of the judgment of the House of Lords in the case of *Kelly* v. *Cornhill Insurance Co. Ltd.*[4] which is the latest case on this subject. I can find nothing there which inclines me to depart from anything I have said.

In the circumstances I would allow the appeal with costs and order that judgment be entered for the original plaintiffs as prayed.

Chua and **Winslow JJ.** concurred.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw*; *Battenberg & Talma.*

KHOR AH KAH v. PUBLIC PROSECUTOR

[A.Cr.J. (Hepworth J.) April 18, 1964]

[Penang — Criminal Appeal No. 5 of 1964]

Penal Code, s. 353 — Using criminal force on police constable in execution of duty — Intent to deter him from his duty as public servant —Whether charge bad for duplicity — Onus on the prosecution.

Criminal Procedure — Charge — Duplicity — Whether separate offences may be charged conjunctively if they arise out of the same transaction.

The appellant who had been convicted under section 353 of the Penal Code appealed on two grounds. She contended, firstly, that the charge was bad for duplicity in that it alleged that (i) she had used criminal force on a police constable in the execution of his duty as a public servant and (ii) that she had done it with intent to deter the police constable from discharging his duty as a public servant. It was argued that these were two separate and distinct offences contemplated under section 353 and therefore the charge was bad. Secondly, it was argued that the prosecution had failed to prove that the police constable was acting in the execution of his duties.

Held: (1) the charge was not bad for duplicity because although the offences charged were separate offences, they were charged conjunctively, and this was permissible because the matter related to one single incident;

(2) the prosecution failed to prove that the police constable was in law a public servant acting "in the execution of his duty".

Cases referred to:—

(1) *R.* v. *Wells, etc. JJ., Ex parte Clifford* (1904) 91 L.T. 98.

(2) *R.* v. *Wilmot* [1933] All E.R. Rep. 628.

(3) *R.* v. *Clow* [1963] 2 All E.R. 216.

(4) *Public Prosecutor* v. *Kok Khee* [1963] M.L.J. 362.

CRIMINAL APPEAL.

David Choong for the appellant.

Wan Ismail bin Wan Mohd. Salleh (Deputy Public Prosecutor) for the respondent.

Hepworth J.: The appellant was charged in the Magistrate's Court, Penang, as follows:—

"You are charged that you on the 2nd day of November, 1963, at about 11.45 a.m. at the five foot-way, of 'Zlin' Shoe Store, Penang Road, Penang, in the State of Penang, did use criminal force on one Ismail bin Ramli, police constable No. 30526, a public servant in the execution of his duties, to wit by hitting him with a slipper and tugging at his uniform with intent thereby to deter the said Ismail bin Ramli, police constable 30526, from the discharge of his duties as such public servant and that you have thereby committed an offence punishable under section 353 of the Penal Code".

The appellant was convicted and fined $100 in default one month's imprisonment. From this conviction and sentence the appellant appealed.

The two main grounds of appeal, and the only ones with which we are concerned, were (1) that the charge was bad for duplicity and (2) that the prosecution had failed to prove that the police constable was acting in the execution of his duties at the relevant time.